Supreme Court, U.S.
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(3)

No. 93-1491

In the
Supreme Court of the United States
October Term, 1993

TONKA CORPORATION,
a Minnesota corporation,

Petitioner,

v.

BITUMINOUS CASUALTY CORPORATION,
THE TRAVELERS INSURANCE COMPANY,
NORTH RIVER INSURANCE COMPANY,
GREAT AMERICAN INSURANCE COMPANY,
INDUSTRIAL INDEMNITY COMPANY,
ZURICH INSURANCE COMPANY,
UNITED STATES FIRE INSURANCE COMPANY,
MISSION NATIONAL INSURANCE COMPANY,
TWIN CITY FIRE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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No. 93-1491

In The
Supreme Court of the United States
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Tonka Corporation, a Minnesota corporation,

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-v.-

Bituminous Casualty Corporation, The Travelers Insurance Company, North River Insurance Company, Great American Insurance Company, Industrial Indemnity Company, Zurich Insurance Company, United States Fire Insurance Company, Mission National Insurance Company, Twin City Fire Insurance Company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

INTRODUCTION

Tonka Corporation ("Tonka") submits this Reply Brief (1) to respond to arguments raised in Respondents' Joint Brief in Opposition to Petition for Writ of Certiorari ("Resp. Br."); and (2) to provide the court with a recent decision issued by the Minnesota Court of Appeals which demonstrates that the lower federal courts failed to apply Minnesota law.[1]

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[1]Respondents, Bituminous Corporation, et al. (the "Insurers"), have erred in their Statement of the Case. The Insurers assert that the State of Minnesota discovered groundwater contamination beneath Tonka's plant. In fact, the City of Mound placed monitoring wells on Tonka's property for the purpose of measuring ground water contamination in an adjacent site. When elevated levels of contaminants were detected in 1984, the city notified Tonka and Tonka, in turn, notified the State of Minnesota of the problem. The MPCA issued a Request for Response Action ("RFRA") which required Tonka to investigate and monitor contamination at the site. The Minnesota Supreme Court has specifically held, in this case, that amounts expended to remedy injury to the state's resources in response to a RFRA are damages covered by comprehensive general liability policies. *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 183 (Minn. 1990).

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL COURTS REQUIRE GUIDANCE AS TO THE APPLICATION OF THE SUMMARY JUDGMENT STANDARD

Tonka's Petition for Certiorari is based on the need for this Court to clarify and refine the summary judgment standard.[2] *See* Petition for Certiorari at 13-24. Tonka also seeks review to rectify a specific injury to its constitutional rights as an individual litigant. In response, the Insurers simply state, without any support, that the standards for granting summary judgment are clear and the courts below applied them. Resp. Br. at 5. Thus, the Insurers ignore the controversy in the courts over the difficulty in applying the summary judgment standard announced eight years ago and the implications of doing so. *See* Jeffrey W. Stempel, *A Distorted Mirror: the Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudicative*

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[2]The Insurers erroneously claim that this case is not set for jury trial. One of the parties has demanded a jury trial. Appendix to Tonka's Reply Brief ("RA-") 20. Tonka is entitled to rely on this party's demand in obtaining a jury trial. *In re N-500L Cases*, 691 F.2d 15 (1st Cir. 1982).

Process, 49 Ohio St. L.J. 95, 107 (1988). Courts around the country require guidance in resolving issues which have arisen since *Celotex* was decided. These issues are as general as how to determine how much evidence the movant must produce to establish its right to judgment (*see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), Brennan J., *dissenting*, at 332) and as specific as what quality of evidence may be considered by the court upon a summary judgment motion (*Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013 (11th Cir. 1987)).

With respect to the specific application of the standard to Tonka, the Insurers acknowledge that the Eighth Circuit failed to articulate the summary judgment standard and how it applies in this case. Ins. Br. at 6, n. 3. Indeed, as Tonka's brief demonstrates, the lower courts ignored the summary judgment standard, weighing and resolving the material fact issues rather than determining if genuine issues of material fact exist. *See* Petition at 15-17.

The Insurers argue, however, that any misapplication of the standard in this case may be ignored because the court has properly articulated the standard in other cases. Resp. Br. at 7, note 3.[3]

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[3]These cases highlight the confusion in the lower courts. For example, *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006 (8th Cir. 1992), *cert. denied*, -- U.S. --, (continued...)

That the Eighth Circuit may articulate the current standard does not demonstrate that it is able properly to apply it. As Tonka demonstrated in its Petition, there is a compelling need for this Court to clarify and guide the lower courts regarding the disposition of cases by summary judgment. This case presents the opportunity for this Court to exercise its supervisory powers and provide the needed guidance to the lower courts. The writ should be granted.

II. THIS COURT SHOULD ESTABLISH STANDARDS FOR CERTIFICATION

The Insurers' argument that certification of the case to the state court was unnecessary is based on two erroneous premises. First, the Insurers' argument that the trial court applied "settled" state law ignores the fact that there existed no Minnesota Supreme Court decision on point (except *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990), which was a case decided

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[3](...continued)
113 S. Ct. 1265 (1993), affirming summary judgment *en banc* with five judges dissenting, demonstrates that judges sitting in the same circuit disagree over application of the summary judgment standard. Moreover, the courts cannot measure the delivery of justice by calculating an average. That other litigants may obtain a fair result does not ameliorate the violation of constitutional rights in this case.

in favor of Tonka but ignored by the lower courts). Second, the Insurers focus upon the pollution exclusion issue, failing even to address the intended/expected exclusion which was the primary issue on which the court decided the case and as to which the trial court and court of appeals made a policy determination which should only be made by Minnesota courts.

A. Tonka Sought Certification In The Lower Court.

As a preliminary matter, the Insurers' claim that review is unnecessary because Tonka failed to bring a motion for certification below is false. *See* Resp. Br. at note 5. Minn. Stat. § 480.061 provides that the Minnesota Supreme Court's jurisdiction may be invoked by a court order from any federal court issued upon motion of a party. Tonka requested certification in the district court (*see* District Court opinion at note 4 (Appendix to Petition for Certiorari at A-26). Tonka also moved the Eighth Circuit for certification. That motion was denied on September 28, 1993. *See* RA-2.

B. The Insurers Have Ignored The Issue.

As noted in Tonka's petition, the trial court erred by formulating state public policy in the guise of "interpreting" the "intended/expected" language of the

insurance contracts. The courts below adopted an inference of intent which rested on public policy grounds. The lower courts not only ignored Minnesota law on this issue, they decided the issue in a way which was directly contrary to Minnesota's interests as articulated in *Minnesota Mining, supra.*

Unable to justify the lower courts' error, or to cite Minnesota precedent which would support the decision below, the Insurers' brief ignores it. The important Minnesota public policy issues inherent in this case required certification to the state court. This Court should accept review in order to articulate clear standards, consistent with federalism principles, for certification of issues to the state courts when there exist no applicable state court decisions.

C. Minnesota Law Is Not "Settled."

As noted above, the Insurers have created a red herring by ignoring the crucial legal issue Tonka raised in its Petition. Focusing solely on the pollution exclusion (on which some law from the Minnesota intermediate appellate court does exist), they argue that the lower courts properly interpreted the pollution exclusion and applied it to the facts. Even as to this legal issue the Insurers are clearly wrong.

In arguing that the law is clear in Minnesota, the Insurers cite three landfill cases. The lower courts

relied on these same decisions.[4] *See* A-36 (District court relies on *Sylvester Bros. Dev. Co. v. Great Central Ins. Co.*, 480 N.W.2d 368 (Minn. Ct. App. 1992) and a Missouri case) and A-6 (Eighth Circuit relies on *Sylvester Bros.* and *Krawczewski v. Western Casualty & Sur. Co.*, 506 N.W.2d 656 (Minn. Ct. App. 1993), and its own decision in *Bureau of Engraving*).[5]

In a very recent decision, however, the Minnesota Court of Appeals rejected the analysis of the pollution exclusion contained in these cases. In *SCSC Corp. v. Allied Mutual Ins. Co.*, No. C2-93-

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[4]The Insurers also state that other courts in this district agree that Minnesota law is clear. Resp. Br. at 7, n. 4. These decisions, also issued by the Minnesota district court, illustrate the federal court's tendency to rely on its own decisions interpreting Minnesota law, rather than state court precedent. The only Minnesota case upon which these courts rely is *Sylvester, supra. See Bureau of Engraving v. Federal Ins. Co.*, 793 F. Supp. 209 (D. Minn. 1992), *aff'd*, 5 F.3d 1175 (8th Cir. 1993), (citing *Sylvester*), and *Bell Lumber & Pole Co. v. United States Fire*, No. 4-89-931, 1994 U.S. Dist. LEXIS 3484 (D. Minn. Mar. 21, 1994) (*citing, Sylvester, Bureau of Engraving*, and *Tonka*).

[5]The Minnesota Supreme Court's denial of review in these cases has no precedential value. In *L.K. v. Gregg*, 425 N.W.2d 813, 815 (Minn. 1988), the court noted specifically that denial of review "is not to be construed as an expression of our approval of either the result or its supporting rationale." *Id.*

1408, 1994 Minn. App. LEXIS 388 (Minn. Ct. App. Apr. 26, 1994), the Minnesota Court of Appeals affirmed a jury verdict in favor of the insured in a case involving contamination of groundwater below the insured's business premises. In its opinion, the Minnesota court held that the determination of the relevant "release" of a pollutant as defined in the landfill cases does not apply in cases not involving landfills. The *SCSC* decision illustrates that the law in Minnesota is not "settled" particularly in non-landfill cases such as the case now before this Court.

The federal court's decision in this case will encourage forum-shopping by parties who view a federal forum as more favorable than a state court forum not only with respect to summary judgment motions generally but also with respect to the substantive issue of insurance coverage for pollution liability. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U.L. Rev. 369, 438-40 (finding that defendants shop forums for liberal summary judgments.) The avoidance of such forum shopping and the equitable administration of the laws were the aims of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *See Hanna v. Plumer*, 380 U.S. 460 (1965). The courts below should have certified this case to the Minnesota Supreme Court to permit that court to consider Minnesota policy in resolving the legal issues presented.

D. The Federal Court May Not Make State Law.

The Insurers' contention that a court's resolution of contract interpretation issues cannot involve state public policy ignores the function of the judiciary in the legal system. *See Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985) (discussion of "reasonable expectations" doctrine and policy reasons supporting it."). The Minnesota Supreme Court regards the question of interpretation of insurance contracts covering cleanup of the states' groundwater as involving state public policy issues. *Minnesota Mining*, 457 N.W.2d 175 (Minn. 1990). The division among the states as to whether the policy language is or is not ambiguous and may be "interpreted" by the court demonstrates that in these close cases, the issues involve political decisions.

The decision in this case will directly impact Minnesota and its citizens. The determination whether insurance will be available to assist the clean up of Minnesota's water resources affects both large and small insureds, those who are able to pay for the clean up regardless of reimbursement by insurers and those who are not. The issue in this case is whether a federal court may decide issues of state public policy. Without guidance from this Court as to the parameters of the decision whether to certify a case to the state court, the federal courts will continue to

make state law and state policy. This Court should grant certiorari in order to provide the guidance federalism requires.

CONCLUSION

Tonka respectfully requests that its petition for a writ of certiorari be granted. In the alternative, Tonka requests that the court vacate the opinion below and certify the case to the Minnesota Supreme Court.

Respectfully submitted,

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2) Reply to Counterclaim dated March 3, 1988 — RA-3

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-3187MNMI

Bituminous Casualty Corp., etc., et al.,	*	
Appellees,	*	Appeal from the United States
vs.	*	District Court for the District of
Tonka Corporation, etc.,	*	Minnesota
Appellant.	*	

Appellant's motion for certification or, in the alternative, stay of the proceedings has been considered by the Court and is hereby denied.

September 28, 1993

Ordered Entered at the Direction of the Court:

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 93-1491

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Supreme Court of the United States
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Tonka Corporation, a Minnesota corporation,

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Bituminous Casualty Corporation, The Travelers Insurance Company, North River Insurance Company, Great American Insurance Company, Industrial Indemnity Company, Zurich Insurance Company, United States Fire Insurance Company, Mission National Insurance Company, Twin City Fire Insurance Company,

Respondents.

REPLY TO COUNTERCLAIM
OF TONKA CORPORATION

Counter-defendant, FIREMAN'S FUND INSURANCE COMPANY ("FFIC"), by its undersigned attorneys, replies to the allegations of the counterclaim of the Defendant/Counterplaintiff, TONKA CORPORATION ("Tonka"), in accordance with the numbered paragraphs therein, as follows:

PARTIES

1. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1".

2. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "2".

3. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3".

4. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "4".

5. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "5".

6. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "6".

7. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "7".

8. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "8".

9. FFIC admits the allegations contained in paragraph "9".

10. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "10".

11. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "11".

12. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "12".

13. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "13".

14. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "14".

15. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "15".

16. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "16".

17. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "17".

18. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "18".

19. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "19".

20. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "20".

21. FFIC admits that it issued three excess policies, Nos. XLX-126-75-37, XLX-126-84-58 and XLX-126-85-77, to Tonka but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "21".

22. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "22".

23. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "23".

24. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "24".

25. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "25".

26. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "26".

27. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "27".

28. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "28".

29. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "29".

30. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "30".

31. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "31".

32. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "33".

33. FFIC denies that one source of the contamination at or near the Tonka Main is due to a "sudden and accidental," as that phrase is used by the FFIC policies, leakage from barrel storage and that a second source of the contamination is a "sudden and accidental," as that phrase is used in the FFIC policies, overflow from a storage tank. FFIC, however, lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "33".

34. FFIC denies that Tonka complied with the conditions precedent to the FFIC policies but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "34".

35. FFIC denies that Tonka complied with the conditions precedent to the FFIC policies but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "35".

36. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "36".

37. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "37".

38. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "38".

39. FFIC admits that it is not providing Tonka with a defense of the MPCA claim since it has no duty to do so but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "39".

40. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "40".

COUNT ONE
(Declaration of Rights and Liabilities)

41. FFIC repeats and realleges each and every response in paragraph "1" through "40" as if fully sets forth herein.

42. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "42".

43. FFIC admits that Tonka requests the declaration of its rights but denies that:

(a) Any costs, losses or damages occurred during the time period covered by the FFIC policies;

(b) Any costs, losses or damages constitute damage or property damage covered by the FFIC policies and are not otherwise excluded from coverage under the FFIC policies; and

(c) Pursuant to the contract between Tonka and FFIC, FFIC had and continues to have an obligation to defend Tonka.

FFIC otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "43".

44. FFIC denies that Tonka is entitled to costs and reasonable attorneys' fees incurred in obtaining this declaratory relief from FFIC but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "44".

COUNT TWO
(Breach of Contract)

45. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "19: through "23" of Tonka's Answer and repeats and realleges each and every response in paragraph "1" through "44" as if fully set forth herein.

46. FFIC denies that its refusal to defend Tonka and its refusal to indemnify Tonka constitute breaches of the contractual obligations between Tonka and FFIC but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "46".

47. FFIC denies that it breached its contractual obligations between Tonka and FFIC but otherwise lacks knowledge or information sufficient to form a

belief as to the truth of the remaining allegations contained in paragraph "47".

COUNT THREE

(Breach of Implied Covenant of Good Safe and Fair Dealings)
(Against Bituminous Casualty Corporation Only)

48. FFIC repeats and realleges each and every response in paragraph "1' through "47" as if fully set forth herein.

49. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "49".

50. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "50".

51. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "51".

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1. The Court lacks jurisdiction because there is no actual and/or justiciable controversy between FFIC and Tonka.

2. The counterclaim and each allegation therein fails to state a claim against FFIC upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

3. Tonka has failed to perform all of the obligations which FFIC's policies require it to perform in order to invoke coverage, including but not limited to obligations imposed by policies as to which the FFIC policies "follow form."

FOURTH AFFIRMATIVE DEFENSE

4. FFIC is not liable to Tonka because there has been no occurrence, as that term is defined by the policies.

FIFTH AFFIRMATIVE DEFENSE

5. FFIC is not liable to RCA because no occurrence, as that term is defined by the policies, has taken place during the policy periods FFIC provided insurance to Tonka.

6. FFIC is not liable to Tonka because of the pollution exclusion clause of the policies, which disallows coverage (assuming that there has been an occurrence under the policies issued to Tonka) for any aspect of the alleged contamination.

SEVENTH AFFIRMATIVE DEFENSE

7. FFIC has no contractual duty or obligation to defend and/or indemnify Tonka.

EIGHTH AFFIRMATIVE DEFENSE

8. To the extent that Tonka seeks equitable relief, Tonka is barred from recovery by the doctrine of unclean hands.

NINTH AFFIRMATIVE DEFENSE

9. It would be contrary to public policy to grant the relief sought by Tonka.

TENTH AFFIRMATIVE DEFENSE

10. FFIC is not liable to Tonka because (assuming that there was an occurrence) Tonka, or its predecessors, failed to provide FFIC with timely notice of any occurrence in violation of the terms and conditions of the policies.

ELEVENTH AFFIRMATIVE DEFENSE

11. FFIC is not liable to Tonka because it, or its predecessors, failed to provide FFIC with timely notice of the claims against it in violation of the terms and conditions of the policies.

TWELFTH AFFIRMATIVE DEFENSE

12. FFIC is not liable for the instant claims because there has been no "property damage," as that term is defined in the policies of insurance.

THIRTEENTH AFFIRMATIVE DEFENSE

13. FFIC is not liable for the instant claims because there has been no "bodily injury" as that term is defined by the policies.

FOURTEENTH AFFIRMATIVE DEFENSE

14. FFIC is not liable to Tonka because there has been no claim for "damages" asserted against Tonka.

FIFTEENTH AFFIRMATIVE DEFENSE

15. FFIC is not liable for the instant claims because (assuming that there has been an "occurrence") all damages occurred on property alienated or owned or rented or occupied by Tonka which are thereby excluded from coverage from the terms and conditions of the policies.

SIXTEENTH AFFIRMATIVE DEFENSE

16. The action is barred, in whole or in part, on the ground of Tonka's failure to take reasonable measures to mitigate its damages.

SEVENTEENTH AFFIRMATIVE DEFENSE

17. FFIC is not liable for monetary obligations assumed or monies voluntarily paid by Tonka in addressing the alleged contamination.

EIGHTEENTH AFFIRMATIVE DEFENSE

18. Any attempt by Tonka to assign any rights it may have had under the FFIC insurance policies is invalid and not binding on FFIC.

NINETEENTH AFFIRMATIVE DEFENSE

19. The policies contain various limits of liability, per occurrence, in the aggregate, and/or in the event of other insurance. In the event that FFIC is found to have liability to indemnify Tonka (which is expressly denied), FFIC's liability is restricted to said limits.

TWENTIETH AFFIRMATIVE DEFENSE

20. All claims against FFIC are barred because of Tonka's failure to perform all of its respective obligations under the policies.

TWENTY-FIRST AFFIRMATIVE DEFENSE

21. All claims against FFIC are barred because of Tonka's failure to adhere to the terms and conditions of the policies.

TWENTY-SECOND AFFIRMATIVE DEFENSE

22. In obtaining insurance coverage from FFIC, Tonka misrepresented or concealed facts which would have caused FFIC to refuse to issue coverage to Tonka.

TWENTY-THIRD AFFIRMATIVE DEFENSE

23. FFIC has no obligation to indemnify Tonka for costs incurred as a result of statutory violations, criminal fines or sanctions, civil fines or sanctions, or other penalties resulting from its conduct.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

24. FFIC alleges that there is no coverage for any claims under the FFIC policies because FFIC's policies are excess to coverage provided by underlying and primary insurance carriers and liability, therefore, does not attach, if at all, unless and until the underlying and primary policies have been exhausted.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

25. This action should be dismissed on the ground of forum non conveniens.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

26. Venue in this Court is not proper.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

27. The action should be dismissed on the basis of certain exclusions, terms and conditions of the insurance policies.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

28. No coverage is provided by FFIC for any punitive damages which may be awarded against Tonka.

TWENTY-NINTH AFFIRMATIVE DEFENSE

29. The action is barred on the ground of the statute of limitations.

THIRTIETH AFFIRMATIVE DEFENSE

30. The action is barred on the ground of laches.

THIRTY-FIRST AFFIRMATIVE DEFENSE

31. Tonka is barred from seeking relief on the ground of its wrongful or intentional conduct.

THIRTY-SECOND AFFIRMATIVE DEFENSE

32. The claim is barred on the ground of Tonka's fraud and misrepresentation regarding the existence of the alleged claims.

THIRTY-THIRD AFFIRMATIVE DEFENSE

33. No coverage is provided by FFIC in the absence of an underlying judicial lawsuit.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

34. FFIC does not provide coverage for any damages which result from Tonka's violation of any rule, law or regulation.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

35. Coverage under any FFIC policy is subject to the limits of liability as set forth in the policies.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

36. Coverage under any FFIC policy is provided only to the named insured or an additional insured.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

37. The Counterclaim fails to join or otherwise make parties to this action certain necessary and indispensable parties to this action including Northfield Insurance Company.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

38. Tonka's counterclaim and joinder of FFIC is in contravention of Magistrate Bernard P. Becker's amended pretrial order dated October 1, 1987.

THIRTY-NINTH AFFIRMATIVE DEFENSE

39. Tonka's amended answer and counterclaim against FFIC is in contravention of Rule 15 of the Federal Rules of Civil Procedure which requires leave of court for the amendment of pleadings.

FORTIETH AFFIRMATIVE DEFENSE

40. Tonka's amended answer and counterclaim against FFIC is in contravention of Rule 14 of the Federal Rules of Civil Procedure which requires leave of court to assert the third-party claims.

FORTY-FIRST AFFIRMATIVE DEFENSE

41. Tonka's counterclaim against and joinder of FFIC in this action is improper; is in contravention of Federal Rules of Civil Procedure; and is prejudicial to FFIC.

WHEREFORE, Counter-defendant FFIC respectfully demands that this Court grant judgment for FFIC as follows:

1. That this Court adjudge, determine and declare that FFIC is not liable to pay and indemnify RCA for any damages, costs and payments incurred or to be incurred by RCA with respect to the underlying claims.

2. That this Court adjudge, determine and declare that FFIC has no duty to defend Tonka and no duty to pay any defense costs in connection with the underlying claims.

3. That this Court adjudge, determine and declare that FFIC is not obligated to pay Tonka the requested damages.

4. That this Court adjudge, determine and declare that FFIC is not obligated to pay Tonka the requested costs, disbursements, and attorneys' fees of this action.

5. That this Court dismiss the counterclaim as against FFIC, with costs, disbursements and attorney' fees.

6. That this Court grant such other and further relief as to this Court may deem just, proper and equitable.

JURY DEMAND

FFIC, by its undersigned attorneys, hereby demands a trial by jury.

Dated: March 3, 1988.

Respectfully submitted,

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